IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1971 of 2004
with
CIVIL APPLICATION No 7121 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA Sd/-
and
HON'BLE MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 to 5 NO

CYANOCHEM

Versus

VIJAYABEN VENKATRAMAN NAIDU C/O NAVJOT ALL GUJARAT LABOUR

Appearance:
1. First Appeal No. 1971 of 2004
SINGHI & CO for Appellant
MR DJ BHATT for Respondent No. 1
..... for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA
and
HON'BLE MR.JUSTICE D.H.WAGHELA

Date of decision: 01/11/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.H.WAGHELA)

1. This appeal has come up for admission hearing after condonation of delay by order dated 10.8.2004 in Civil Application No.5230 of 2004 wherein it was expressly stated that the application was made for condonation of delay of 10 days in filing of the First Appeal. It is apparent from the record and the first para of the memo of appeal that the present appeal is preferred from the orders dated 1.6.2001 and 6.10.2003. Upon seeking clarification, it was candidly conceded at the outset by the learned counsel for the appellant that the condonation of delay of 10 days was in respect of the latter order dated 6.10.2003 and not even an application for condonation of delay in challenging the earlier main order dated 1.6.2001 was made. It was seen from the Civil Application No.5230 of 2004 made for condonation of delay that in para 3 of that application it was stated as under:

> "3. The applicant submits that there is a delay of 10 days in filing of the aforesaid appeal. The delay has been occurred due to unavailability of certified copy of the order of the Hon'ble Labour Court. The order was passed on 6.10.2003 and the certified copy shows the outward No.4242 dated 3.11.2003. Therefore, it is evident that the certified copy of the order of the Labour Court was not available to the applicant before 3.11.2003."

2. The provision for limitation in filing of the appeals is made in sub-section (2) of Section 30 of the Workmen's Compensation Act, 1923 ("the Act) wherein the period of limitation for preferring an appeal is 60 days. Therefore, the appeal challenging the order dated 1.6.2001 in Workmen's Compensation Application No.44 of 1997 made by the learned Commissioner under the Act is not maintainable for being barred by limitation.

3. Perusing the latter order dated 6.10.2003, it appears to be an order made in a miscellaneous application in Workmen's Compensation Application No.44 of 1997 seeking review of the first order dated 1.6.2001 whereby widow of the workman was awarded due amounts of compensation after an elaborate judgment. The review application has been rejected as being not maintainable and in view of the limited powers of the Workmen's Compensation Commissioner under Rule 32 of the Gujarat Workmen's Compensation Rules. That application was based

on an utterly baseless averment that the earlier order dated 1.6.2001 was an ex parte order. Therefore, in short, the latter miscellaneous application was baseless and not maintainable since its very inception and no argument whatsoever has been addressed at the time of admission hearing of this appeal to assail the order dated 6.10.2003.

4. As seen hereinabove, the main order directing payment of compensation to the respondent No.1 could not have been challenged in appeal without crossing the bar of limitation and even an application for that purpose is not made. However, the learned counsel strenuously argued that, in the facts of the present case, the respondent-ESI Corporation had covered the factory of the appellant under the scheme of the Employees State Insurance Act, 1948 and having regard to the documentary evidence, the order dated 1.6.2001 ought not to have been made. We were taken through that judgment and order. What stands out upon perusal of the said judgment is that the appellant had, even after making an application for the purpose and having sought adjournment, not filed even its written statement. After perusal of the documents produced in support of the plea that the factory of the appellant was covered, the learned Commissioner recorded a finding of fact to the effect that, on the date of the accident or the death of the deceased, the factory of the appellant was not covered and, as on that day, the provisions of the Employees Insurance Act, 1948 ("the ESI Act") did not apply to the case. While arriving at this finding, the documents produced by the appellant at Annexures-15/1 to 15/5 and 18/1 were perused and a finding that an unsuccessful plan to saddle the ESI Corporation with the liability was hatched has been recorded after considering the same. Obviously the coverage of the ESI Act was sought by the appellant by a form purported to have been filled on 26.2.1997 and such application was supposed to have been sent to the ESI Corporation on the same day under certificate of posting without ensuring its delivery. On that basis, the ESI Corporation had allotted Code number and conveyed by letter dated 15.4.1997 that the establishment of the appellant fell within the purview of Section 2 (12) of the ESI Act with effect from 1.2.1997. There is a finding of fact based on material on record that the application for obtaining the coverage and code number was concocted and, in any case, the contributions were paid to the ESI Corporation on 26.4.1997 and the necessary declaration forms of the workmen were sent on 25.7.1997. All these appear to have happened after the death of the workman on 18.3.1997. It is significant to

note that the appellant did not even make an attempt to show that it employed 10 or more employees at any time and, instead, its witness admitted, as noted in the impugned judgment, that no declaration form in respect of the deceased workman was submitted and hence no benefit under the ESI scheme could be claimed. Surprisingly, the appellant appears to have sought to introduce a piece of fresh documentary evidence during the course of hearing of its review application and that was a letter purporting to be a handwritten letter dated 7.5.2003 of the Deputy Director, ESI Corporation, to the appellant and it purported to state that the final date of coverage of the factory of the appellant was 7.1.1996 which, if true, contradicts the appellant's own version. The contents of none of the documents relied upon by the apellant appear to be properly proved. In such circumstances and in view of the clear defence taken by the ESI Corporation that the establishment of the appellant was not covered under the ESI Act when the deceased workman met with an accident and died, the order to pay compensation under the Act was made.

5. The learned counsel for the appellant relied upon the ratio of the judgment of the Supreme Court in BHARAGATH ENGINEERING v. R. RANGANAYAKI AND ANOTHER [(2003) 2 SCC 138] wherein it is held that Section 38 of the ESI Act casts a statutory obligation on the employer to insure its employees and, that being a statutory obligation, the date of commencement has to be from the date of employment of the employee concerned. In the facts of that case, the employee was employed on and from 20.5.1987 and the registration for the purpose of insurance was granted subsequent to the death of the employee. In that context, it was observed by the Apex Court that there is a statutory obligation to pay the contribution in respect of every employee once the factory or establishment is covered by the Act and the obligation to pay the contribution commences from the date of the application of the Act to such factory or establishment. In the facts of the present case, the application of the ESI Act clearly appears to have been invited with retrospective effect by the documents which were of doubtful authenticity and genuineness and, therefore, rightly discarded by the learned Commissioner.

6. In the above facts and circumstances, even if the delay in filing of the appeal were condoned, we would not have been justified in interfering with the order dated 1.6.2001. Therefore, the appeal is summarily dismissed. Since the widow of the deceased had been joined as a party in the application for condonation of delay and she

has appeared through an advocate and since the payment of compensation has been delayed by not less than seven years and in view of the peculiar facts and circumstances of prolonged litigation, the appellant is directed to pay to the respondent No.1, by way of costs, Rs.1,000/-. The civil application for stay does not survive in view of dismissal of the appeal and it accordingly stands rejected.

Sd/-

(A.M.Kapadia,J.)

Sd/-

(D.H.Waghela,J.)

(KMG Thilake)